IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 999

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

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Petitioners pray that a Writ of Certiorari issue to review the Decree of the United States Court of Appeal for the Ninth Circuit entered on March 20, 1957.

Citations and Opinions Below.

The Opinion of the United States Court of Appeal for the Ninth Circuit, dated February 12, 1957, is reported at 241 F. 2d 147 and is printed in Appendix "A" hereto, *infra*, page 1. The Decision and Order of the National Labor Relations Board enforced thereby, is printed in Appendix "B" hereto, *infra*, page 21, and is reported at 113 N. L. R. B. No. 123.

Jurisdiction.

The Decree of the United States Court of Appeal for the Ninth Circuit was entered on March 20, 1957. The jurisdiction of this court is invoked under 28 U. S. C. 1254-1 and Section 10(e) of the Labor Management Relations Act of 1947.

Statute Involved.

The Statutory provisions involved are the Taft-Hartley Act (Labor Management Relations Act, 1947, 29 U. S. C. 141 *et seq.*) 29 U. S. C. A. 151 *et seq.*). The pertinent provisions are printed in Appendix "C" hereto, *infra*, page 49.

Question Presented.

Where the employer has bound himself by the collective bargaining process not to require his employees to work on non-union materials, does the execution of such a provision amount to a violation of the secondary boycott proscription of the statute?

Statement of the Case.

The following statement is verbatim the Statement presented by the Unions in the Ninth Circuit. References therein are to the printed record in the Ninth Circuit designated by the Board and the Unions. In the Ninth Circuit the Unions opposed enforcement of the Board's order on the following contentions, only the last of which is urged here: (1) The Board did not have inassertable jurisdiction over the Unions; (2) On the record considered as a whole there has been no violation of Section 8(b)(4) and (A); (3) There was no strike within the meaning of the Statute; (4) Steinert acted solely as a rep-

resentative of management when he instructed employees to cease their work on the doors; (5) *The Collective Bargaining Agreement was a defense to the charges alleged and found.*

Upon charges filed by Sand Door and Plywood Company, Los Angeles, California, a wholesale jobber of building materials, the General Counsel of the Board issued a complaint, which in substance alleged that Respondents since on or about August 17, 1954 instructed the employees of a building contractor named Havstad and Jensen to refuse to install certain doors because Respondents' rules and by-laws prohibit the installation of products not bearing the union label of the United Brotherhood of Carpenters and Joiners of America, AFL, or an affiliate thereof. [R. 1-2, 5-6.] By this conduct, it is alleged, Respondents have induced and encouraged the employees of Havstad and Jensen, in the course of their employment, to refuse to handle or work on certain doors, the object being to force Havstad and Jensen, and other employers, to cease doing business with the charging party and Paine Lumber Company of Oshkosh, Wisconsin. These acts, it is alleged, constitute unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. (29 U. S. C. A., Sec. 158(b)(4)(A).) The Respondents' answer to this complaint denied the commission of the unfair labor practices alleged and affirmatively averred that the Board lacked assertable jurisdiction over the subject matter of the complaint and the persons of the Respondents.

Sand Door and Plywood Company, the charging party, hereinafter referred to as Sand, is a California corporation, and has an arrangement with Paine Lumber Com-

pany of Oshkosh, Wisconsin for the distribution in Southern California of doors obtained from Paine. There was no labor dispute between Sand and its employees, Sand's intermediary, Watson & Dreps, and their employees, or Paine and its employees. Nor does the record show that Respondents have had any relationships with any of these three concerns. [R. 168-169, 170-171.]

In 1953, Sand received from Paine materials, including doors, valued at $185,796.85, no part of which had any connection with the instant controversy. In 1954, Sand received from Paine materials, including doors, valued at $103,503.05, which were shipped by Paine to various points in the state of California, among which was an item of approximately $9,000.00 [R. 198], being doors purchased by Watson and Dreps, a partnership, who took delivery at Sand's warehouse. The record does not show what Watson and Dreps did with these doors. [R. 171-174.]

Havstad and Jensen, joint venturers, in 1952 began the construction of a hospital and other buildings for the College of Medical Evangelists, in the City of Los Angeles, California. In mid-August of 1954, 398 doors were delivered to the hospital building site, but the record does not reveal how they got there or from whence they came. [R. 187-188, 193.]

Havstad and Jensen, as building contractors, were parties to a Master Labor Agreement [R. 193-195], negotiated in their behalf by the Building Contractors Association, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California [R. 195-196, 197, 201-204.] This agreement governed the wages and working conditions of the employees of Havstad and

Jensen. [R. 201-204.] Among the conditions of employment created by this agreement was a provision that, *"Workmen shall not be required to handle non-union material."* [R. 203.] By the express terms of this agreement, the parties convenanted that they would take no action, by any means whatsoever, "that will prevent or impede . . . the full and complete performance of each and every term and condition hereof." [R. 203-204.]

Arnold Steinert, Havstad and Jensen's foreman, at this building site, whose duties involved the assignment and supervision of work performed by the carpenters and laborers at this location, and who was in charge of the operations in connection with James Nicholson, the general superintendent for Havstad and Jensen [R. 105-106] on August 17, 1954 carried out his usual functions. In the normal course of the work, the employees report for work at 8:00 A.M., but Steinert, as foreman, usually arrives ahead of the employees and lays out his work plans for the day and assigns the various employees to the tasks he has selected for them. After the delivery of these doors in question, Steinert instructed the laborers of Havstad and Jensen to distribute these doors to the various floors of the building, preparatory to their being "hung" by a carpenter, by the name of Sam Agronovich. About the same time, Steinert instructed Agronovich to begin the necessary preparations.

From the beginning of work done that day (8:00 A.M.), until after 11:00 A.M., Steinert was the only official of Havstad and Jensen present at this building site and was then in sole charge of all the employees [R. 131-132]. Shortly before 11:00 A.M. of that day, Nathan Fleisher, business agent of Respondent Car-

penters' Local 1976, came to the building site and met Steinert in the lobby of the building and told Steinert that the doors were non-union and that "We'd have to quit hanging the doors until it was settled." The laborers, pursuant to Steinert's previous instructions, were, at the time, moving the doors from floor to floor, and Steinert instructed them to cease the distribution. [R. 164-165.]

Steinert then went to where Sam Agronovich was working and instructed Agronovich to discontinue the preparatory work, as the doors appeared to be non-union, and assigned Agronovich to other duties. After that, Steinert went on with his work, "going around to check on the work progress of the other employees under his supervision." [R. 165-166.] Fleisher, the business agent of Respondent Carpenters' Local 1976, took no part in any of these attendant conversations or instructions by Steinert. [R. 167-168.]

Nicholson, the general superintendent, reported on the job about thirty minutes after the above occurrence, learned what had happened, and went to the job site looking for Fleisher and found the laborers were waiting for Steinert to assign them to other duties. [R. 113-116, 136.] Nicholson then went directly to Fleisher [R. 132] and asked him why he had stopped the men from hanging the doors. [R. 133-134.] Fleisher said he had taken this action so that it could be determined whether the doors were union or non-union. Nicholson admittedly lost his temper and ordered the employees to "pick up their tools," the equivalent of discharge, but upon calmer reflection directed that Sam Agronovich be assigned to other duties. All other carpenters continued in the performance of tasks previously assigned to them by foreman Steinert. [R. 118, 135.] Neither Nicholson nor

Steinert assigned or attempted to assign any of the other carpenters to the duty of hanging doors. [R. 135.]

James C. Barron, vice-president of Sand, later learned that the hanging of the doors had been stopped and telephoned to Earl Thomas, secretary of Respondent District Council, asking "what the story was regarding the hanging of the doors" and was told by Thomas that he intended to ascertain if the doors were union made, and would advise Barron of his discovery. [R. 177-178.] The following day Thomas advised Barron that the doors were not union made and informed Barron that carpenters could not hang non-union doors. Thomas attempted to persuade Barron to have his company deal in union products and sought to work out a plan whereby the doors could be installed and future installation could be made on conformance with the provisions of collective bargaining agreements that prohibited employees from handling non-union materials. Barron declined to cooperate in these suggestions. [R. 178-180; 186, 191.]

Sand next filed the instant charges and the Board sought an injunction in the United States District Court for the Southern District of California, which was denied. During the hearing in that matter, the judge observed that only one person had been stopped from hanging the doors and that no other carpenters had been assigned to such tasks or requested to do so. The day following this observation, at the instance of Sand, Nicholson, Havstad and Jensen's general superintendent, and a member of the carpenters' union, and Steinert, as superintendent on the job, went to each carpenter, separately, and asked each if he "would be willing to hang the doors" and from each received a negative reply. [R. 136-150.]

Haystad and Jensen did not request Local 1976 to furnish other men to hang these doors. [R. 150-153, 97.]

The Trial Examiner of the Board, who took and heard the evidence, recommended that the complaint be dismissed for the reason that the provisions of the Master Labor Agreement that "Workmen shall not be required to handle non-union materials" removed this type of duties from the course of employment, and hence there were no violations of the Act. [R. 26-28.]

Reasons for Granting This Petition.

The question presented by this petition has not been decided by this court.

The instant decision of the Ninth Circuit conflicts with the decision of the Second Circuit in *Rabouin, d.b.a. Conway Express v. N.L.R.B.*, 195 F. 2d 906, 912.

Prior to the decision in this case the Board had uniformly held that where an employer had bound himself by the collective bargaining process not to require his employees to work on non-union materials the execution of such a provision did not amount to a violation of the secondary boycott proscription of the statute. In this the Board was strongly supported by the decision of the Second Circuit in *Conway Express v. N.L.R.B.*, 195 F. 2d 906, 912. In that case a collective contract had, in like manner, removed from the employment area any requirement to work on non-union goods. Charged by Conway of 8(b)(4)(A) violations (on which the Board had ruled against Conway), that court said:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle (Conways) shipments under the terms of the area agreement provision re-

lating to cargo shipped by struck employees. Consent in advance to honor a hot cargo clause is not the product of the unions' forcing or requiring any employer . . . to cease doing business with any other person.'

"Of course, the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employer for the purpose of the section is now well recognized."

In the Board Decision here four members hold that where an employer, at the request of a union agrees to boycott the goods of another employer there is no violation of Section 8(b)(4)(A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct. Say these four members, "what an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a 'hot cargo'" clause. The fifth member would hold such clause void. But at this point the members part company. Two members say that while such a contract is not against public policy and otherwise valid, the union may not approach the employees of the contracting employer and in accordance with the contract provisions induce those employees to observe the hot cargo provisions without engaging in a violation of the section of the statute here considered. Two other members hold that such a construction is destructive of the collective bargaining benefits and that it does not amount to a violation when the union agents inform the employees, for whose benefit the collective part is executed, of the hot cargo provisions or attempts to have such employees abide by the rule thus established.

We submit that the dissenting opinion of member Murdock is the only logical and proper decision that can be reached in this case and we adopt by reference all of the arguments against the validity of the order which he presents.

We agree that it is illogical to conclude, as two members of the Board do, that it is legal and proper to adopt a hot cargo provision in a collective bargaining contract but that a union party to such agreement is barred by the statute from acquainting the employees benefited by the collective contract of the provision and requesting or commanding that such employees obey those provisions. The members who so held do not quarrel with the propriety of the union exerting pressure against the contracting employer to reach the same results. That, they say is permissible. But if the union tells its members about the provision and that results in the provisions of the contract being carried out, then the union has contravened the statute. This conclusion has been rejected by the United States Supreme Court. (See *Assoc. of Westinghouse Employees v. Westinghouse Corp.*, 348 U. S. 437.)

The instant case is one of three currently in the Circuit Courts.

The *American Iron and Machine Works* cases, Nos. 13394 and 13406, in the District of Columbia Circuit, were argued there on January 11, 1957. These cases involving the activities of Local 886, General Drivers, and Local 850, Machinists, with this employer, present the same questions as the instant case, to-wit, the hot cargo clause and communications under it by the unions to the employees. By telephone advices we learn that today, May

9, 1957, the District of Columbia Circuit decided these cases in conformance with our contentions here.

The *General Millwork Corporation* case in the Sixth Circuit was decided there on April 10, 1957, adversely to our contentions. (*N.L.R.B. v. Local 11, U. B. of C. & J. of A.*, 39 L. R: R. M. 2731, 242 F. 2d .....)

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters and Nathan Fleisher, Respondents. No. 15,026.

Feb. 12, 1957.

Petition for Enforcement of Order of the National Labor Relations Board.

Before HEALY, LEMMON, and FEE, Circuit Judges.

LEMMON, Circuit Judge.

While the National Labor Relations Act, hereinafter referred to as the Act, has been termed in "its inception a novel experiment", which "has remained a controversial piece of legislation",[1] its provisions dealing with secondary boycotts—at least insofar as they are applicable to the instant case—seem to us to be tolerably clear and eminently fair.

1. *Statement of the Case*

The Sand Door and Plywood Company, of Los Angeles, California hereinafter Sand, on August 25, 1954, filed a charge against the respondents, hereinafter the Union, alleging that the latter had engaged in unfair labor practices within the meaning of 29 USCA §158(b)(4)(A).

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[1] Proposals for Modification of Unfair Labor Practice Procedures Under the NLRA, Stanford Law Review, December, 1956, Vol. 9, No. 1, pp. 155 et seq.

On September 24, 1954, the General Counsel of the National Labor Relations Board, hereinafter the Board, before which the charge had been filed, presented a complaint against the Union, which in substance alleged that the Union, "since on or about August 17, 1954, . . . [had] instructed the employees of Havstad & Jensen" at a certain college to be detailed hereinafter, and the employees of other employers, "to refuse to install Paine Rezo doors [infra] because [the Union's] rules and by-laws prohibit the installation of products not bearing the union label," etc. It was further alleged that by such conduct the Union had "engaged in, and . . . induced and encouraged the employees of Havstad & Jensen and of other employers to engage in, strikes or concerted refusals in the course of their employment to use, manufacture, [etc.] . . . goods, articles, [etc.] . . . or to perform services."

The complaint also averred that an object of the Union's "acts and conduct . . . is to force or require Havstad & Jensen, Watson and Dreps [infra] and other employers or persons to cease using, [etc.] or otherwise dealing in the products of Sand and Paine and to cease doing business with Sand and Paine."

By the above acts, the complaint continued, the Union was engaging in unfair labor practices within §158(b)(4)(A).

The Union's answer denied the commission of the unfair labor practices alleged, and affirmatively averred that "the Board lacked jurisdiction over the subject matter of the complaint or of the persons of the respondents."

On October 15, 1954, Sand filed a "First Amended Charge", and on the same day the Board filed an "Amendment to Complaint", neither of which materially altered their respective original allegations.

On December 13, 1954, the Trial Examiner filed an "Intermediate Report and Recommended Order", in which it was "recommended that the complaint be dismissed in its entirety".

On August 26, 1955, the Board handed down a "Decision and Order" holding that "By inducing and encouraging employees of Havstad and Jensen to engage in a strike or concerted refusal in the course of their employment to handle or install doors manufactured by Paine Lumber company [hereafter Paine], an object thereof being to force and require Havstad and Jensen to cease using, handling or otherwise dealing in the products of Paine . . . and to force or require Sand . . . to cease doing business with Paine . . ., the [Union has] engaged in and [is] engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act". 113 NLRB 1210, No. 123.

The Decision and Order were signed by two members of the Board, including the chairman, and was specially concurred in by a third member. Two members dissented.

On February 3, 1956, the Board filed in this Court a petition for enforcement of the Board's order. It is that petition which we are here considering.

2. *Statement of Facts*

Havstad and Jensen, joint venturers, were engaged in the construction of a hospital and other buildings on the campus of the College of Medical Evangelists, a medical

school and nurses' training school owned and operated by the Seventh Day Adventists in Los Angeles.

Doors for the hospital, which was known as the White Memorial Hospital, were manufactured by Paine, and were purchased by Sand, a wholesale jobber and exclusive agent for Paine in Southern California. Sand sold the doors to Watson & Dreps, mill work contractors, with delivery between August 14, 1954, and August 17, 1954. Although counsel for the Union claims that "The record does not show what Watson & Dreps did with these doors"; there is testimony that delivery of the doors to the job, where Haystad & Jensen were in charge, commenced on the Friday before August 17, and that on August 17, a member of the firm of Watson & Dreps informed James C. Barron, vice president and general manager of Sand, that Emmett R. Jensen, one of the joint venturers with Larry C. Havstad, had reported "that the carpenters on the job had refused to handle the doors because the doors did not have a union label." This testimony provides a sufficient link between Watson and Dreps and Haystad & Jensen, as regards the doors.

Between 10 and 11 o'clock in the forenoon of August 17, 1954, Arnold Steinert, carpenter foreman of Havstad & Jensen, was told by Nathan Fleisher, business agent of Local 1976, one of the respondents herein, that "we'd have to quit hanging the doors until they got it settled that they were union or non-union doors, and they were going to check on 'em and in a day of two they would be cleared and then we could go ahead and go to work . . . . he said they were non-union doors, and they didn't have a label and we'd have to quit hanging the doors until it was settled."

Earlier in the morning, Steinert had assigned laborers "to move the doors from floor to floor, the doors that went on each floor." He had also assigned Sam Agronovich, a carpenter, to start hanging doors. When Steinert received the order from Fleisher "to quit hanging the doors," he proceeded to carry out the mandate:

"Well, the laborers were moving the doors from floor to floor so I told them to leave them alone, leave 'em set and we went down into the basement where Sam Agronovich was working and told him we'd have to quit hanging the doors because they weren't union until they got it settled."

Fleisher was present when Steinert talked to Agronovich.

When James Layton Nicholson, Havstad & Jensen's general superintendent of construction on the White Memorial Hospital project, arrived at his office that same morning, he was informed by the firm's secretary that "Fleisher had been on the job and had called the carpenters off from hanging the doors." Nicholson went to the jobsite and "observed that the laborers that [were] supposed to be placing the doors were not working at the time." When he asked the laborers for the reason, "All they said is that the union stopped them from hanging the doors, . . . and they [were] waiting for my foreman to replace them, or, in other words, give them other duties. . . ."

Nicholson found Fleisher, who was also at the building site, and asked him why he had stopped the men from hanging the doors. The following conversation, according to Nicholson, ensued:

"He says he had orders from the District Council that morning to stop them from hanging the doors until they could establish the fact whether they were union or non-union made doors. He says, 'I could have pulled them off yesterday but I waited until today.' And I told him at the time that, well, I says that I always thought I should have notice before, anybody could be pulled off, and he says, 'Well, those are my orders,' so he says 'We will have to stop hanging the doors until they get cleared by the union'."

At that juncture, Sam Agronovich and Saul Agronovich, the latter being the steward and also a carpenter, came up. Superintendent Nicholson at first told them that "if we can't hang the doors they might as well pick up their tools." Later Nicholson reconsidered the matter and told Steinert "to relocate the men and in such a way they could keep on working."

On that day and the next, James C. Barron, the Sand executive, supra, got into touch by telephone with Earl Thomas, of the Los Angeles County District Council of Carpenters. In a second conversation Thomas informed Barron that he had received a telegram from a union officer in Wisconsin, informing him that "the doors were not union made and that Paine . . . . did not belong to any union." According to Barron, the following conversation then ensued:

"I replied to him that—'Well, what are we going to do here, because the doors are here, and we are an innocent bystander? We are union and Watson & Dreps are union and the contractors are union, even the people that hauled the doors out here on the train were union people.' He

said: 'Well, . . . under the circumstances, we can't hang non-union doors,' but he said to me, 'Why don't you buy union doors?' "

Barron also talked to Fleisher, who told him "that the doors don't have a union label, and they have to be cleared before I can permit them to be hung."

Jensen, of Havstad & Jensen, also talked to Thomas, who told him that he had found out that Paine "was not a union operation," and "that the carpenters would not be able to handle those doors."

On Tuesday, October 5, 1954, after Sand had filed the instant charges and the Board had sought a temporary restraining order, Superintendent Nicholson, who was himself "a union man," and Steinert asked each carpenter, separately, whether he "would be willing to hang the doors," and from each there was received a negative reply, though some of the carpenters qualified their answers by saying that they would hang the doors if they "could get clearance" on them, or if the doors "were released."

The "By-Laws and Trade Rules" of the District Council of Carpenters of the United Brotherhood of Carpenters of America, of which Steinert was a member, provided that "Only members of the . . . Brotherhood . . . shall be permitted to do carpenter work on any job," and that "No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the . . . Brotherhood. . . . "

Similarly, the "Labor Agreement Between Southern California General Contractors and United Brotherhood

of Carpenters and Joiners of America," hereinafter "Labor Agreement," contains the following provision:

"Workmen shall not be required to handle non-union material."

The crucial question in this connection is whether such a provision justifies *a work stoppage* by the employees.

3. *The Applicable Statute*

§158. Unfair labor practices.

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ."

4. *The Board's Assertion of Jurisdiction was Proper*

Before the trial examiner, it was stipulated that in 1953, Sand received from Paine, the headquarters of which was at Oshkosh, Wisconsin, materials, including doors, valued at $185,796.84. From January 1, 1954, to September 8, 1954, inclusive, Sand received from Paine,

materials, including doors, valued at $103,503.05. The doors in controversy are valued at $9,148.32. Sand received the doors between August 10 and August 14, 1954, and notified Watson & Dreps, the buyers, who took delivery at Sand's warehouse during the period between August 14 and August 17. We have already traced the delivery of the doors from Watson & Dreps to Havstad & Jensen.

In other words, Paine, whose products were the real target of the Union's actions, shipped materials valued at more than $100,000 from its Wisconsin plant to Sand, its Southern California distributor, during the first nine months of 1954, the crucial period here.

The Union, by refusing to use the doors on the Havstad & Jensen hospital job in Los Angeles, thereby interfered with more than a so-called *de minimis* flow of shipments into California. This is sufficient to bring the Union's obstructionist activities within the Board's legal jurisdiction.

In National Labor Relations Board v. Denver Building & Construction Trades Council, 1951, 341 U. S. 675, 683-684, the Board had found that the activities complained of had had a sufficient impact upon interstate commerce to sustain its jurisdiction, and the Court of Appeals was satisfied. The Supreme Court commented that "We see no justification for reversing that conclusion," and added:

"The Board found that, in 1947, Gould & Preisner purchased $86,560.30 of raw materials, of which $55,745.25, or about 65% were purchased outside of Colorado. Also, much of the merchandise it purchased in Colorado had been produced outside of that State. While Gould & Preisner performed no services outside of Colorado, it

shipped $5,000 of its products outside of that State. Up to the time when its services were discontinued on the instant project, it had expended on it about $315 for labor and about $350 for materials. On a 65% basis, $225 of those materials would be from out of the State. The Board adopted its examiner's finding that any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State and it recognized that Gould & Preisner's annual purchase of over $55,000 of such materials was not negligible.

"The Board also adopted the finding that the activities complained of had a close, intimate and substantial relation to trade, traffic and commerce among the states and that they tended to lead, and had led, to labor disputes burdening and obstructing commerce and the free flow of commerce. *The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.*" [Emphasis supplied.][2]

It is immaterial, so far as the Board's legal jurisdiction is concerned, that Havstad & Jensen obtained the doors from Paine from an intermediary in California—Watson & Dreps—rather than by direct shipment from out of the State. See National Labor Relations Board v. Cowell Portland Cement Co., 9 Cir., 1945, 148 F. 2d 237, 242, certiorari denied, 1945, 326 U. S. 735; National Labor Relations Board v. Townsend, 9 Cir., 1950, 185 F. 2d 378, 382-383, certiorari denied, 1951, 341 U. S. 909.

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[2]See also Local 74, United Brotherhood of Carpenters & Joiners of America v. National Labor Relations Board, 1951, 341 U. S. 707, 712.

We agree with the Board that the Trial Examiner erroneously designated Havstad & Jensen as the primary employer, in considering whether jurisdiction was to be asserted. Havstad & Jensen was a neutral employer whose carpenters were unlawfully induced by Fleisher, via Steinert, to refuse to install the doors in question. Paine was the primary employer, for it was *Paine's* products to which the Union objected. Havstad & Jensen was the *secondary* employer.

It is clear, then, that the dispute had a sufficient impact upon commerce to be subject to the Board's jurisdiction as a matter of law. We next address ourselves to the question of whether the Board should have *assumed* jurisdiction in the instant case. In other words, does the present controversy meet what the Union terms the Board's "monetary" standards?

In Jonesboro Grain Drying Co-operative, Case No. 32-RC-693, 110 NLRB 481, 483, No. 67, decided on October 26, 1954, the Board announced, *inter alia*, the following jurisdictional standard:

"Accordingly, we have determined that in future cases the Board will assert jurisdiction over enterprises which annually meet *one or more* of the following standards:

* * *

"(2) *Direct outflow standard:*

An enterprise which produces or handles goods and ships such goods out of State, or performs services outside the State in which the enterprise is located, valued at $50,000 or more." [Emphasis supplied.]

In Truck Drivers Local Union No. 649 (Jamestown Builders Exchange), Case No. 3-CC-19, 93 NLRB 386,

387, No. 51, decided on February 23, 1951, the Board said:

"By its very nature the effect of a secondary boycott extends beyond the operations of the primary employer with which the union is engaged in a dispute, and reaches the secondary employers whom the Union is attempting to force or require to cease dealing with the primary employer by means prescribed [*sic*] in Section 8(b)(4) [29 USCA §158(b)(4), *supra*]."

Chief Judge Clark, in National Labor Relations Board v. Associated Musicians, etc., 2 Cir., 1955, 226 F. 2d 900, 907, certiorari denied, 1956, 351 U. S. 962, commented:

"In any event it is doubtful under the Act whether coverage of the secondary employer need be established independent of coverage of the primary employer. . . . We think the better view is that the secondary activity is but an extension of the labor dispute with the primary employer and that the business of both employers are to be considered in determining jurisdiction of the secondary activity. The opposite conclusion would require the fragmenting of the authority of the Board over labor disputes —a result which, lacking specific legislative command, we should shun. [Citing *Jamestown Builders Exchange, supra*, and McAllister Transfer case, *infra*.]"[3]

Finally, as Judge Mathews observed in National Labor Relations Board v. Stoller, 9 Cir., 1953, 207 F. 2d 305, 307, certiorari denied, 1954, 347 U. S. 919, "The general rule is that; where the Board has jurisdiction, as it had

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[3]See also Joliet Contractors Ass'n v. National Labor Relations Board, 7 Cir., 1952, 193 F. 2d 833, 840.

in this case, whether such jurisdiction, should be exercised is for the Board, not the courts, to determine."

The Board's assertion of jurisdiction in the instant case was proper.

5. *The Board Was Correct in Finding That the Union Violated the Act by Inducing Employees of Havstad & Jensen to Refuse to Install Paine Doors*

As we have seen, the evidence shows that there is no serious question that Steinert, following Fleisher's instructions, caused employees of Havstad & Jensen to engage in a concerted work stoppage for the object forbidden by Section 8(b)(4)(A).

The union contends that "If this idleness can be termed a work stoppage, it is clear that the cessation did not originate with the employees but was a direct result of managerial orders." It is also urged that "Havstad & Jensen were parties to and bound by a collective bargaining agreement whereby they had previously agreed not to require 'workmen to handle non-union materials'."

In our view, there was inducement to a concerted refusal in the statutory sense, not authorized by the contract between Havstad & Jensen and the Union. An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented under §8(b)(4)(A) of the Act (29 USCA §158(b)(4)(A), supra), when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when the object—

clearly present here—"is . . . forcing or requiring any employer . . . to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person."

In the instant case, we have seen that, despite the "hot cargo" provision in the contract, *supra*, the employees had actually been handling Paine doors. They ceased doing so only upon Fleisher's and Steiner's orders. Those orders, we think, were in direct contravention of the mandate.

In National Labor Relations Board v. Washington-Oregon Shingle Weavers' Dist. Council, 9 Cir., 1954, 211 F. 2d 149, 152, we said:

"The prohibited object of the boycott is stated by the statute to be 'forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *.' In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible. * * * The only dispute between the Union and the Company was over the latter's use of unfair shingles, and had no bearing on wages, working conditions, etc. In such a case, a strike called by the Union can have no other purpose than to compel the Company to cease using what the Union considers unfair shingles.

"Furthermore, the legislative history of the Act [*infra*] clearly shows that Congress intended to proscribe exactly the type of union action involved here."

In General Drivers, etc., and American Iron and Machine Works Company, No. 121, 115 NLRB 800, 801, decided on March 15, 1956, the Board said:

"1. We find, as did the Trial Examiner, that Respondent Teamsters, by its inducement of Employees of the common carriers (secondary employers) to engage in a concerted refusal in the course of their employment to handle freight brought by American Iron and Machine Works Company (the primary employer) to the carriers' docks, with an object of forcing or requiring the carriers to cease doing business with American Iron, violated Section 8(b)(4)(A) of the Act.

"Like the Trial Examiner, we reject the contention of Teamsters that its conduct was excused by the 'hot cargo' clause in the Teamsters' contracts with the common carriers. This clause provided that members of Teamsters 'shall not be allowed to handle or haul freight to or from an unfair company.' However, in rejecting this defense, we do not rely, as did the Trial Examiner on [McAllister Transfer, Inc., 110 NLRB 1769], but rather on the more recent Board decision in [Sand Door and Plywood Co., 113 NLRB 1210, No. 123, decided August 26, 1955][4] which was decided after the issuance of the Intermediate Report in the case at bar. As stated in the principal opinion in that case, regardless of the existence of a 'hot cargo' clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8(b)(4)(A) is present. Thus, while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the *employer* to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees,

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[4]—the instant case.

and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle the 'hot' goods." [Emphasis supplied.]

Similarly, in International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc., 110 NLRB 1769, No. 224, supra, decided on December 16, 1954, the Board used the following language:

"We are concerned here with clauses in collective-bargaining agreements, commonly known as 'hot cargo' clauses, which provide that the Union and employees may refuse to handle goods designated as 'unfair' and that such refusal shall not be deemed a violation of the contract or cause for discharge. . . . The Respondents in the instant case, as part of their efforts to force McAllister's employees to join their locals, determined that McAllister freight was 'unfair'. The Respondents thereupon engaged in a boycott of McAllister freight through other common carriers, . . . with which they had contracts containing so-called 'hot cargo' clauses. . . . .

"Essentially, then, the basic question, as we see it, is whether these ['hot cargo'] clauses constitute a meritorious defense to the complaint which alleges violations of Section 8(b)(4)(A) and (B).

"In enacting these provisions of the Act, it is clear that Congress declared a public policy against *all* secondary boycotts, without distinction as to type or kind.

"As the late Senator Taft stated in the course of the legislative debate: . . .

"'The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no

matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice.' 93 Cong. Rec. 4323.

"More specifically, Senate Report No. 105 on S. 1126 stated:

"Because of the nature of certain of these practices, especially jurisdictional disputes and *secondary boycotts* and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes.*

"Hence, we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and *boycotts* defined as 'unfair labor practices.' [Emphasis added by the Board.]

"We deem it significant that Congress spoke in unmistakable terms of the protection of 'the public welfare which is inextricably involved' in such disputes, and pointedly characterized the Board as 'acting in the public interest and not in vindication of purely private rights'. It is of course, a necessary concomitant of the protection of the public welfare that protection is also extended to employees and employers as well. But it is only fair to say that such protection to private interests was in no way intended by Congress to detract from the public in-

terest that constitutes the very foundation of the policies implicit in these statutory enactments. It has by this time become axiomatic that the exclusive grant of authority to the Board to prevent unfair labor practices affecting commerce was to insure that the existence of some private agreements at odds with the statute does not preclude the Board from acting in the public interest. . . .

* * *

". . . we necessarily feel constrained to pass on the validity of the 'hot cargo' clauses offered as a defense for the Respondent's conduct, and to make the unequivocal finding that such clauses are contrary to public policy and cannot therefore serve as a defense."

As was observed by Judge Bratton in National Labor Relations Board v. United Brotherhood of Carpenters and Joiners, etc., 10 Cir., 1950, 184 F. 2d 60, 64, certiorari denied, 1951, 341 U.S. 947, "The basic purpose and objective of the section of the Act is to prohibit the involvement of employers in labor disputes of other employers with whom they are doing business."

Finally, we consider the Union's argument that the work stoppage "was a direct result of managerial orders". That contention is based upon the theory that Steinert, the foreman, "acted solely as a representative of management when he instructed employees to cease their work on the doors".

Steinert was a member of Local 563 of the Union. The By-Laws and Trade Rules of the Los Angeles County District Council of Carpenters required that he belong to the Union, and that he should hire no non-union members. As foreman, he and the steward were "equally responsible for the enforcement of all By-Laws and Trade

Rules," etc. Violators of that rule were "subject to a fine of $100.00 and/or expulsion."

Therefore, when Fleisher ordered Steinert to stop work on the doors because they were non-union, it is logical to assume that he was invoking Steinert's obligations under the Union's rules. Cf. National Labor Relations Board v. Cement Masons Local No. 555, 9 Cir., 1955, 225 F. 2d 168, 173-174, and cases there cited.

The fact that in some respects foremen, as has been said of buyers, "may also be agents of employers does not eliminate them from the scope of" §158(b)(4)(A). Amalgamated Meat Cutters, etc. v. National Labor Relations Board, CA D.C., 1956, 237 F. 2d 20, 23.

The Union seeks to brush aside the force of its own rules by quoting the closing clause of Article XIII of the "Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America," which reads as follows:

". . . that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder."

The above rule is not applicable here. We are not now concerned with Steinert's "relations" to "the contractors," but with his "relations" to his Union and his status and obligations therein. No contract with his employers could interfere with those relations, so long as he remained a member of the Union, which he indubitably was. So long as he remained a member, he was bound by the

Union rules governing his relations to the Union. The proposition is so plain as to require no further elaboration.

Nor could Steinert "waive" the Union's power to fine him $100 for violating the subsection of the "By-Laws and Trade Rules" holding him jointly responsible with the steward for their enforcement!

We hold that the Board was correct in holding that the Union, through its foreman Steinert and its business agent Fleisher, violated §158(b)(4)(A) by ordering employees of Havstad and Jensen to refuse to install Paine doors.

6. *Conclusion*

Accordingly, we hold that the Board's assertion of jurisdiction was proper, and that it was correct in finding that the Union violated the Act by ordering employees of Havstad & Jensen to refuse to install doors that had been manufactured by Paine.

A decree should issue enforcing the Board's order in full.

(Endorsed:) Opinion. Filed Feb. 12, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

United States of America

Before the National Labor Relations Board

Case No. 21-CC-189

Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, its agent, Nathan Fleisher, and Los Angeles County District Council of Carpenters[1] and Sand Door and Plywood Co.

Decision and Order

On December 13, 1954, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had not engaged in and were not engaging in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, exceptions, and briefs were filed by the General Counsel, the charging party, and the Respondents, and a brief amicus was filed by the Chamber of Commerce of the United States. Pursuant to notice, oral argument was held on July 7, 1955, before the Board at Washington, D. C., in which the General Counsel, the charging party, and the Respondents participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire

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[1]The name of the District Council appears as amended at the hearing.

record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with this Decision and order.

1. The Respondents except to the Trial Examiner's recommendation that jurisdiction should be asserted herein. The complaint alleges that the Respondents induced and encouraged employees of Havstad and Jensen and of other employers to engage in concerted refusals to install nonunion doors manufactured by Paine Lumber Company,[2] and supplied by Sand Door and Plywood Co.,[3] the charging party, to Havstad and Jensen,[4] with an object of forcing or requiring Havstad and Jensen, Watson and Dreps, and other employers to cease using or otherwise dealing in the products of Paine and Sand and to cease doing business with Paine and Sand, thereby violating Section 8 (b) (4) (A) of the Act.

In the Jamestown Builders Exchange case,[5] the Board set forth the rule which it has since followed[6] for determining whether to assert jurisdiction in cases involved

[2]Hereinafter referred to as Paine.

[3]Hereinafter referred to as Sand.

[4]The doors in question were shipped by Paine from its Wisconsin plant directly to Sand, the exclusive distributor of Paine doors in Southern California, and were sold by Sand to Watson & Dreps, a building materials retailer, which, in turn, sold the doors to Havstad and Jensen, who were engaged in building a hospital as joint venturers.

[5]Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Jamestown Builders Exchange, Inc.), 93 NLRB 380.

[6]See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, et al. (McAllister Transfer, Inc.), 110 NLRB 1769, hereinafter referred to as McAllister Transfer, Inc.

alleged secondary boycotts in violation of Section 8 (b) (4) (A). This rule provides that if the operations of the primary employer alone satisfy the Board's jurisdictional standards, jurisdiction is to be asserted without further inquiry. Otherwise, operations of secondary employers are also to be considered to the extent that they are affected by the alleged unlawful conduct.[7]

We agree with the General Counsel that the Trial Examiner erroneously designated Havstad and Jensen as the primary employer in this case in considering whether jurisdiction was to be asserted. As hereinafter found, Havstad and Jensen was a neutral employer whose employees were unlawfully induced or encouraged to refuse to install the doors in question. As such, Havstad and Jensen is a secondary employer within the meaning which we customarily attach to that term. Furthermore, we agree with the General Counsel that Paine is a primary employer within the meaning of the Jamestown jurisdictional rule. Thus, the violation found herein is similar to that involved in the Sound Shingle Co.[8] case. As in that case, the Respondents seek, by proscribed means, to force or require an employer to stop handling the nonunion product of another manufacturer although no active dispute exists between the nonunion manufacturer and the Respondents. The Board there held that such conduct "constitutes a secondary boycott of the type which Section 8 (b) (4) (A) was intended to proscribe." Implicit

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[7] As to the interpretation of this rule as it applies to operations of secondary employers, see McAllister Transfer, Inc., supra.

[8] Washington-Oregon Shingle Weavers' District Council et al (Sound Shingle Co.), 101 NLRB 1159, Member Murdock dissenting. Enforced, 211 F. 2d 946 (C. A. 9, 1954). Hereinafter referred to as Sound Shingle Co.

in that finding was the further finding that the manufacturer of the nonunion product was in the position of a primary employer. And although there was an active primary dispute with the primary employer in the Jamestown case, we perceive no reason to restrict the use of the term primary employer as used in that case to employers with whom the union involved has an active primary dispute. Accordingly, we find that Paine's annual direct outflow of materials from Wisconsin, being in excess of $100,000, is sufficient to warrant the assertion of jurisdiction in this case.[9]

2. The Respondents contend that, on the record in this case, the Board should find that the Respondents did not induce or encourage employees of Havstad and Jensen to engage in a strike or concerted refusal to install the Paine doors, and that the Trial Examiner's contrary findings should be reversed. On the other hand, the General Counsel and the charging party each contend that the record discloses incidents of inducement or encouragement in addition to those found by the Trial Examiner. In particular, the General Counsel contends that Foreman Steinert's instructions to carpenter Agronovich and several laborers, hereinafter referred to, constitute proscribed inducement and encouragement attributable to the Respondents. We find merit in this contention.

As the Trial Examiner found, on the morning of August 17, 1954, Fleisher, the Respondent Local's business agent, approached Steinert, Havstad and Jensen's foreman, at the building site, and told Steinert to stop

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[9] Jonesboro Grain Drying Cooperative, 110 NLRB 481. It is therefore unnecessary to consider other arguments advanced by the General Counsel for asserting jurisdiction in this case.

hanging the Paine doors until it could be determined whether they were union or nonunion. Steinert told several laborers, who were under his supervision and then engaged in distributing the doors to the locations where they were to be hung, to stop distributing the doors. Then, accompanied by Fleisher, Steinert went to the location where carpenter Agronovich was preparing to hang doors and told him to stop hanging the doors because they were not union-made. Steinert was a member of a constituent local of the Respondent District Council. Under its By-Laws and Trade Rules, Steinert was vested with the authority and responsibility to enforce the District Council's By-Laws and Trade Rules.[10] Among the rules was one barring union members from handling nonunion materials.[11]

It is true that as a foreman as well as union agent, Steinert's status at first glance appears equivocal. However, it is clear that Fleisher, who, as the Trial Examiner found, was an agent of both the Respondent District Council and the Respondent Local, approached Steinert not as a representative of management but as an instrumentality of the Respondents through whom the by-laws could be enforced. Thus, Fleisher did not ask Steinert to stop the door hanging, but, in Steinert's words, Fleisher "told me that we'd have to quit hanging the doors." (em-

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[10]Section 20 (f) of the By-Laws and Trade Rules provides: All foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion.

[11]Section 16 (d) of the By-Laws and Trade Rules provides in part: No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America.

phasis added). Also, when, shortly thereafter, Superintendent Nicholson asked Fleisher why he stopped the men from hanging the doors, as credibly testified to by Nicholson, Fleisher replied that "he had orders from the District Council that morning to stop them from hanging the doors," that he "could have pulled them off yesterday but * * * waited until today." Significantly too, after giving his instructions to Steinert, Fleisher stood by to insure that Steinert passed these instructions on to employees. Furthermore, Fleisher did not approach Steinert to gain enforcement of their contract which the Respondents claim relieved the carpenters of the duty of installing the Paine doors, for at no time in his conversations with Steinert or Nicholson was the contract mentioned by Fleisher. We note in this connection that Steinert, as a foreman, was at the lowest level of management and not an official who would normally be approached as to matters of company policy and contract compliance. As there is, in addition, no indication of the extent of Steinert's authority to act for his employer, we conclude that Fleisher approached Steinert in Steinert's capacity as agent of the Respondent District Council and that Steinert acted in such capacity in ordering the laborers and carpenter Agronovich to stop handling the doors, thereby inducing or encouraging them to engage in a concerted refusal to handle the Paine doors.[12] We further conclude that Steinert's conduct is attributable to the Respondent Local because Steinert acted pursuant to the orders of Fleisher, who was the business agent of the Respondent Local.

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[12]In view of this finding, we need not determine whether there was any other incident constituting such inducement or encouragement.

3. We find no merit in the Respondents' contention that, even assuming that there was inducement and encouragement of a concerted refusal to hang the doors, it was not for an object proscribed by the Act. In effect, the Respondents contend that their activity was primary because its only objective was to require Havstad and Jensen to use union-made materials in accordance with their contract, hereinafter referred to, and because the Respondents had no active labor dispute with Paine. As indicated above, we regard our decision in Sound Shingle Co.,[13] as dispositive of this issue. Here, as there, a direct object of such inducement was to force or require the secondary employer to cease using or handling the product of the primary employer, another manufacturer. We held that such a product boycott is proscribed by the Act, even in the absence of an active dispute over specific demands with the manufacturer of a nonunion product. As it is clear, under Board precedents, that, in order to find a violation of Section 8 (b) (4) (A), the object proscribed by the Act need not be the sole object of the conduct under scrutiny,[14] we conclude that the proscribed object necessary to a finding of a violation exists in this case.

Moreover, we are of the opinion that the record establishes the existence of another object of the Respondents' conduct which falls within the interdiction of Section 8 (b) (4) (A). Thus, when Barron of Sand Door called Thomas, the secretary-treasurer of the District Council,

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[13]Supra.

[14]Los Angeles Building and Construction Trades Council, AFL, (Standard Oil Co.), 105 NLRB 868 at 870, and cases cited therein; Wood, Wire and Metal Lathers International Union, Local No. 234, AFL (Acousti Engineering Company), 97 NLRB 574.

for information about the District Council's position with respect to the Paine doors, Thomas stated that clearance might be obtained for the doors purchased by Havstad and Jensen, as well as Sand Door's floor stock and special orders, if Sand's stock orders were cancelled and no further orders were placed with Paine. From this conversation, it is clear that a further objective of the Respondents' conduct was to force or require Sand Door to cease doing business with Paine. Under Section 8 (b) (4) (A), "forcing or requiring * * * any employer or other person * * * to cease doing business with any other person" (emphasis added) is proscribed when means made unlawful by that Section are employed. Thus, it is not necessary that the employer or person whom the labor organization seeks to force to cease doing business with another person be the employer of the employees who have been induced or encouraged to engage in a work stoppage for that purpose. Accordingly, we find that an additional object of the Respondents' conduct, proscribed by the Act, was to force or require Sand to cease doing business with Paine.

4. The final issue which remains to be considered in this case is whether the Respondents' contract with Havstad and Jensen which provides, "Workmen shall not be required to handle nonunion material," removes the above-described conduct from the proscription of Section 8 (b) (4) (A) under the so-called Conway doctrine. In the Conway Express case,[15] shop stewards, at three establish-

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[15]International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 294, AF of L (Henry V. Rabouin, d/b/a Conway's Express), 87 NLRB 972, at 981-983, affirmed 195 F. 2d 906, (C.A. 2, 1952).

ments of secondary employers, upon advice from the respondent union in that case that a strike was "on," ceased handling freight of a struck primary employer. Each of the three secondary employers acquiesced in its employees' refusal to handle the "struck" goods. In addition, each of these 3 employers was a party to an agreement which reserved to the union the right to refuse to handle such goods. As the secondary employers had, in effect, consented in advance to boycott the "struck" employer, a majority of the Board concluded that the failure of their employees to handle the struck goods "was not in the literal sense a 'strike' or 'refusal' to work, nor was any such concerted insubordination contemplated by the Respondent when it caused the employees to exercise their contractual privilege." The Board rejected a contention that the contract clause relied on was repugnant to the policy of the Act and therefore invalid.

Subsequently, the problem of the effect of a substantially similar "hot cargo" clause arose in the Pittsburgh Plate Glass case.[16] In that case, again, the secondary employers affirmed their "hot cargo" contracts by acquiescing in their enforcement. The Board found no violation of Section 8 (b) (4) (A), relying on its Conway Express decision, and adding as a further ground that the refusal to handle "struck" freight was not "in the course of * * * employment," within the meaning of Section 8 (b) (4) (A), as the "hot cargo" clause in the contract excluded from required job duties work on such goods.

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[16]Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 (Pittsburgh Plate Glass Company), 105 NLRB 740 at 743-745.

As in McAllister Transfer, Inc.[17] and Reilly Cartage Company,[18] the validity of these decisions is now challenged by the General Counsel, the Trial Examiner in the instant case having felt bound to follow them.

It is well settled that, where an employer, at the request of a union which refrains from the use of threats or direct appeals to his employees, voluntarily agrees to boycott the goods of another employer, there is no violation of Section 8 (b) (4) (A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct.[19] What an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a "hot cargo" clause. Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy. However, we do not agree that unions, which are parties to such contracts, may approach employees of the contracting employer and induce or encourage them to refuse to handle the goods of another employer with immunity from the sanctions of Section 8 (b) (4) (A). In our opinion, such conduct constitutes inducement or encouragement of employees to engage in a concerted refusal to handle goods for an object proscribed by Section 8 (b) (4) (A) no less than it

[17]McAllister Transfer, Inc., supra.

[18]Marie T. Reilly d/b/a Reilly Cartage Company, 110 NLRB 1742.

[19]Printing Specialities and Paper Converters Union, Local 388, AFL, (Sealright Pacific, Ltd), 82 NLRB 271, 272 at fn. 4; Lewis Karlton d/b/a Consolidated Frame Company, 91 NLRB 1295 at 1299; Local Union 878, International Brotherhood of Teamsters, e. a. (Arkansas Express, Inc.), 93 NLRB 255.

does in the absence of such agreement.[20] Such conduct is contrary to the express language of the Statute, and therefore cannot be validated by the existence of a contract containing a "hot cargo" clause. In enacting Section 8 (b) (4) (A), Congress intended to protect the public from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes.[21]

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[20]This is essentially the view expressed by Chairman Farmer in his concurring opinion in the McAllister case, in which he said that if a contrary view were adopted" * * * the Board would place itself in the posture of championing boycott clauses and affirmatively enforcing them as between the parties. This is the inevitable result of giving the agreement crucial weight in evaluating the conduct of the parties, and refusing to find a violation solely because of the contract's existence in the face of other evidence which * * * clearly shows that all the essential statutory elements of an unlawful boycott are nevertheless present."

[21]The preamble of the Act, Section 1 (b), makes it clear that: * * * employers, employees, and labor organizations [should] * * * above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce * * * to proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (emphasis added)

With specific reference to Section 8 (b) (4) (A) the following excerpts appear in the legislative history.

Senate Report No. 105 on S. 1126, p. 8 (I Leg. Hist. 414) stated: Because of the nature of certain of these practices, especially jurisdictional disputes and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.

* * * * *

Hence, we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices

The Employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted. Until the Employer instructs his employees that they need not handle the "unfair" product, a strike or concerted refusal to handle such goods constitutes "a strike or concerted refusal in the course of employment" to handle the goods within the meaning of Section 8 (b) (4) (A). In this connection, we disagree with the holding in the Pittsburgh Plate Glass case that the words, "* * *

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and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. (Emphasis added)

Senator Taft stated in debate (93 Cong. Rec. 4323, April 29, 1947): Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that. (Emphasis added)

Representative Landis stated (93 Cong. Rec. A 1296, March 24, 1947): Secondary boycotts engaged in by labor unions to force a third party, not a party to a primary labor dispute, to force that party to cease using the products of the employer engaged in the primary dispute is an activity which should be made illegal. Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of the deliveries of milk, bread, meat, fruits, vegetables, and other essentials of life. (Emphasis added)

in the course of employment," found in Section 8 (b) (4) (A) have a restrictive meaning. We are persuaded that Congress used this phrase only to distinguish between employees in their capacity as employees and employees in their capacity as consumers.

We hold that, regardless of the existence of a "hot cargo" clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Accordingly, having found that such conduct occurred, for a proscribed object, we conclude that the Respondents violated Section 8 (b) (4) (A).[22]

The effect of the unfair labor practices on commerce.

The activities of the Respondents, set forth above, occurring in connection with the operations of Paine Lumber Company, Sand Door and Plywood Co., and other employers as described in the Intermediate Report attached hereto, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondents violated Section 8 (b) (4) (A) of the Act, as set forth above, we shall order them to cease and desist from such conduct. We shall also order that the Respondents take certain affirmative action designed to effectuate the policies of the Act.

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[22] To the extent that the Board's decisions in Conway's Express, supra, and Pittsburgh Plate Glass Company, supra, are inconsistent with the majority holdings in this case, they are overruled.

Conclusions of Law

1. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters are labor organizations within the meaning of Section 2 (5) of the Act. Nathan Fleisher is business agent of Respondent Local 1976, and an agent of Respondent District Council within the meaning of the Act.

2. By inducing and encouraging employees of Havstad and Jensen to engage in a strike or concerted refusal in the course of their employment to handle or install doors manufactured by Paine Lumber Company, an object thereof being to force and require Havstad and Jensen to cease using, handling or otherwise dealing in the products of Paine Lumber Company and to force or require Sand Door and Plywood Company to cease doing business with Paine Lumber Company, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters, and their officers, representatives, successors, assigns, and agents, including Respondent Nathan Fleisher, shall:

1. Cease and desist from inducing or encouraging the employees of Havstad and Jensen, or any other em-

ployer, to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services for their employer, where an object thereof is to force or require Havstad and Jensen or any other employer or person to cease using, handling, or otherwise dealing in the products of Paine Lumber Company or any other nonunion manufacturer, or to force or require Sand Door and Plywood Co., or any other employer or person, to cease doing business with Paine Lumber Company or any other nonunion manufacturer.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their Los Angeles, California, business offices, respectively, copies of the notice attached hereto as Appendix A.[23] Copies of said notice, to be furnished by the Regional Director for the Twenty-First Region, shall, after being duly signed by the official representatives of the Respondents, including Nathan Fleisher, be posted by the Respondents Local 1976 and District Council, immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to members of said labor organizations are customarily posted.

Reasonable steps shall be taken by said Respondents to insure that said notices are not altered, defaced, or covered by any other material.

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[23] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

(b) Notify the Regional Director for the Twenty-First Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, August 26, 1955, Washington, D. C.

[Seal] GUY FARMER, Chairman

BOYD LEEDOM, Member

National Labor Relations Board

Philip Ray Rodgers, Member, concurring:

I am concurring in the result reached herein by Chairman Farmer and Member Leedom only because I am convinced that "hot cargo" clauses are contrary to public policy and cannot therefore serve as a defense to a complaint charging a violation of Section 8 (b) (4) (A) of the Act.

In my joint opinion with Member Beeson in McAllister Transfer Inc., supra, I stated that a careful reading of the legislative history and an analysis of the established principles of law lead to the inevitable conclusion that Section 8 (b) (4) (A) of the Act was specifically intended to protect the public interest. More specifically, as stated in Senate Report No. 105 on S. 1126,[24] the provisions with which we are concerned here were adopted "in order adequately to protect the public welfare which is inextricably involved in labor disputes." I pointed out that it is a necessary concomitant of the protection of the public welfare that protection is also extended to employers and employees as well, but that such protection to private interests was in no way intended to detract

[24] Senate Report No. 105, p. 8 (1 Leg. Hist. 414).

from "the public interest that constitutes the very foundation of the policies implicit in these statutory enactments." In adopting these provisions of the Act, Congress clearly adopted a public policy against all secondary boycotts, without distinction as to type or kind. To hold otherwise is to substitute confusion for clarity and to create ambiguities in the face of a clear Congressional intent. To quote from our McAllister opinion:

No amount of ingenuity, it seems to us, can change the simple fact that a "hot cargo" contract is nothing more than a device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act.

In my view of the facts of the instant case, the "hot cargo" contract, as a subterfuge for avoiding the proscriptions of the Act and as an effort at advance immunization against unfair labor practice findings, is patently unenforceable. It follows therefore as a matter of law that this is not the type of agreement that can justify the conduct engaged in here. It is for this reason that while I concur in the result reached here I cannot join in the majority's rationale.

Dated, August 26, 1955, Washington, D. C.

PHILIP RAY RODGERS, Member
National Labor Relations Board

Ivar H. Peterson, Member, dissenting:

I do not agree with the majority of my colleagues that the Board is warranted in asserting jurisdiction here.

The facts with respect to this issue are substantially undisputed. Havstad and Jensen are joint venturers engaged in the State of California in the construction of a hospital building on the campus of the College of Medical Evangelists for the Seventh Day Adventists. This project commenced on July 1, 1952, and was still in progress at the time of the hearing. The nonunion doors were purchased by Havstad and Jensen from Watson and Dreps, millwork contractors in Los Angeles, and were valued at approximately $9,000. Watson and Dreps purchased the doors from Sand Door and Plywood Co., the charging party, which is also located in and around Los Angeles and is engaged in the wholesale jobbing of doors, plywood, and related building materials. Watson and Dreps took delivery of the doors at the Sand Door warehouse. The latter, in turn, had purchased the doors from Paine Lumber Company at Oshkosh, Wisconsin, which shipped them directly to Sand Door from Wisconsin. On the present record, the only one of the above-named firms, whose business is sufficiently large so as to afford any possible justification for assertion of jurisdiction, is Paine— the Wisconsin manufacturer of the nonunion doors. In reaching its decision to exercise jurisdiction here based upon Paine's operations the majority attempts to analogize the situation to that in the Sound Shingle Case.[25] I do not consider it necessary to quarrel with the characterization of Paine as the primary employer and Havstad

[25] See footnote 8, supra.

and Jensen as the secondary employer. However, I can not accept the majority's further conclusion that merely because such designations are made, ipso facto, there is reason for asserting jurisdiction here. In so doing, the majority is completely disregarding what for me is a critical and determinative difference between the Sound Shingle case and the instant one. Thus, in that case the Canadian manufacturer dealt directly with Sound Shingle, the employer whose employees the union was causing to refuse to work on the particular nonunion products. In the present case, we have two intermediate purchasers of the nonunion doors, between Paine and Havstad and Jensen.

I find nothing in either the Jamestown[26] or Sound Shingle cases to support the exercise of jurisdiction where, as here, the original manufacturer is the only party whose commerce facts happen to come within the Board's standards and its relationship with the ultimate purchaser is so remote. If an analogy is to be drawn between the instant case and other Board decisions, I submit that it is strikingly similar to the Brooks Wood line of cases.[27] In the latter cases, the Board has consistently declined to exercise jurisdiction over a manufacturer of goods which sells them to a purchaser within the same State, which purchaser has the manufacturer ship them directly to still another purchaser within the State, even though the final purchaser does a substantial interstate business. The chain of sales of the nonunion doors is here the same as in the Brooks Wood type of case with

[26] See footnote 5, supra.

[27] Brooks Wood Products, 107 NLRB 237; C. P. Evans Food Stores, Inc., 108 NLRB 1651; McDonald, McLaughlin & Deane, 110 NLRB 1340.

the sole exception being that there it was the ultimate purchaser, while in the instant case it is the manufacturer, which does the substantial interstate business. The rationale for the Board's refusal to exercise jurisdiction in the Brooks Wood line of cases was that the particular manufacturer's business is not once, but "twice removed" from interstate commerce. This reasoning is equally applicable here. Although I have agreed with the Board's special treatment of the jurisdictional question in secondary boycott cases as expressed in its Jamestown decision, I consider it an unwarranted extension of the rule laid down in that case to exercise jurisdiction here, despite the fact that the labor dispute involving Havstad and Jensen is twice removed from the manufacturer whose interstate commerce might be affected thereby.

I think it should be noted that the majority opinion clearly implies that in a product boycott case jurisdiction will be taken regardless of the number of intervening purchasers. Thus, if the manufacturer of nonunion products happens to do a sufficiently large interstate business, even though the goods to literally a score of intermediate purchasers all of whom, including the ultimate buyer, operate completely intrastate enterprises, the Board will assert jurisdiction solely because the manufacturer is the employer with whom the union primarily has its dispute. I believe that, to say the least, it is unrealistic not to recognize that in such circumstances, and indeed in the instant case as well, the impact of the union's activities at the situs of the secondary employer upon the commerce of the primary employer is relatively insubstantial.

In view of the foregoing, it is my opinion that it will not effectuate the policies of the Act to assert jurisdiction here. Accordingly, I would dismiss the complaint.

on this ground. However, because of the importance of the principle involved, I have also considered the merits of the case and agree with the views expressed by Member Murdock in his dissenting opinion.

Dated, August 26, 1955, Washington, D. C.

IVAR H. PETERSON, Member
National Labor Relations Board

Abe Murdock, Member, dissenting:

I concur in Member Peterson's opinion. It is apparent that the assertion of jurisdiction in this case results in a double standard of jurisdiction—a highly restrictive standard for 8 (a) cases and an almost limitless standard for cases involving violations of Section 8(b). However, as a majority of the Board is asserting jurisdiction, I have considered the case on the merits.

In this case the Respondent Union, representing employees of Havstad and Jensen, building contractors, had bargained for and secured by contract an agreement that the Company would not require workmen to handle nonunion material. In the course of constructing a Los Angeles hospital Havstad and Jensen purchased a number of nonunion doors from Watson & Dreps, retailers. The latter had purchased these doors from Sand Door & Plywood Company, wholesalers, which, in turn, had purchased them from the Paine Lumber Co., Ltd., of Oshkosh, Wisconsin. The record is perfectly clear that neither this Union nor any other Union was engaged in a dispute with any of these companies except Havstad and Jensen. That dispute related directly and solely to the Respondent Union's invocation of Havstad and Jensen's contractual commitment not to require employees to handle nonunion material. Despite the fact that the

Union acted pursuant to this contract, which a majority of the Board finds to be legal and not opposed to public policy, and despite the fact that the Union was careful to call only to the attention of Havstad and Jensen's foreman the fact that the doors in question were nonunion, three members of the Board conclude that the Union has engaged in a secondary boycott within the meaning of Section 8 (b) (4) (A). I believe that the several bases of the majority's decision are untenable.

The three members of the majority are, it appears, in disagreement as to the effect of a provision in a collective bargaining contract whereby the employer agrees that its employees will not be required to handle nonunion material. Member Rodgers adheres to his position in McAllister Transfer, Inc.,[28] in which he and former Member Beeson held that such contracts were opposed to public policy and were therefore unenforceable. I believe that Member Peterson's and my dissenting opinion in that case is a complete and adequate answer to this view. Chairman Farmer and Member Leedom now contend in this case that such contracts, while not opposed to public policy and presumably enforceable in the courts, are nevertheless no defense to allegations that the contracting Union has induced employees, whom it represents, to engage in a strike or concerted refusal in the course of their employment to handle such nonunion products.

In his concurring opinion in McAllister Transfer, Inc., Chairman Farmer rejected the view of Member Rodgers and former Member Beeson to the effect that that a "hot cargo" clause was "at war with the secondary boycott provisions of Section 8 (b) (4)." In that case he

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[28] Supra.

asserted that such a view "glosses over the plain language of the Statute which makes it an essential element of an unlawful boycott that the union 'engage in, or induce or encourage * * * employees * * * to engage in a strike or a concerted refusal' to handle the goods of another employer." He did not believe, he indicated, that a strike or a concerted refusal to work was induced where an employer voluntarily, either on an ad hoc basis or by means of a written contract provision, agreed to boycott another employer's products. He pointed out what seemed to him the fallacy in the argument that such contracts were opposed to public policy. Congress, he said, had not forbidden such voluntary acts of employers and it was for Congress, not the Board, to change the law "if conduct of this character is thought to endanger the public welfare." In the instant case he joins Member Leedom in finding that the Union's inducement of employees, despite their employer's voluntary agreement not to require them to handle nonunion material, is "contrary to the express language of the Statute." The language of the Statute, it seems to me, cannot be expressly both ways. I believe Chairman Farmer was right the first time. In a footnote, however, Chairman Farmer and Member Leedom assert that their finding in this case, cited above, is essentially the same view expressed by Chairman Farmer in his concurrence in the McAllister case. If this is so, it is, indeed, a puzzling inconsistency because it would mean that Chairman Farmer had taken the position in that case that the plain language of the Statute both permitted and forbade the operation of a hot cargo clause. I had thought the language taken from Chairman Farmer's McAllister concurrence, quoted in the above footnote, referred to a situation where, as there, the employer had repudiated his contract and directed

his employees to handle hot cargo. This would seem to be supported by his subsequent distinction of the Conway case: "It is impossible to say here, as in Conway, that there was no unlawful 'inducement' or 'refusal' on the part of the employees to handle McAllister freight. This is so for the simple reason that the secondary employers here posted notices to their employees directing them to handle all freight without discrimination."

I am, moreover, at a loss to understand the new rationale which he and Member Leedom expound. First they agree that the inducement of employers to cease doing business with other employers is not unlawful under Section 8 (b) (4) (A). They then concede that what an employer may be induced to do he may be induced in advance to do by the execution of a contract freeing his employees from the duty of handling nonunion material during the term of the contract. Notwithstanding these findings, they thereupon take the position that the Union may not approach the employees it represents and for whose benefit the contract was made to notify them that their contract reserves to them the right not to handle nonunion material. Such notification, they find, induces these employees to engage in a strike, despite their employer's advance permission granting them the right to refrain from performing this work. These conclusions, in my opinion, cannot logically stand together. A contract does not consist of words on a piece of paper. It is a binding agreement between the contracting parties that requires them to behave toward each other in a specific manner under a given set of circumstances, present or future. If they can legally agree, as Chairman Farmer and Member Leedom concede they can, that employees will not be required to handle nonunion material,

I know of no authority that would define as a "strike" or a "refusal to work" the union's reliance upon this contractual permission. To find that employees are induced to engage in an act of insubordination against their employer solely on the ground that their own bargaining representative called to their attention the existence of a lawful provision in their lawful contract seems to me an untenable conclusion. It was, in my opinion, the duty of this Union to keep the employees it represented informed at all times of their rights under the contract, including the fact that handling nonunion material was not within the scope of their employment.

The decision of Chairman Farmer and Member Leedom encourages employers to violate their lawful agreements with labor organizations. Indeed, it tells them that they may freely take whatever the Union has given in collective bargaining to secure such an agreement without fear or ever having to pay the quid pro quo. It repudiates for an employer a voluntary agreement that he has never repudiated himself. It forbids a union, under penalty of the Board's injunctive processes, to assume that the employer meant what he said when he agreed in advance that his employees would not have to handle nonunion material. Such a decision gravely and adversely affects the collective bargaining process, which it is the duty of this Board to promote and encourage. In this respect, it does not serve the general welfare and does not effectuate the intent of Congress to minimize strife and establish peaceful collective bargaining in the field of labor relations.

The majority further finds that the Union's object in this case was "to force or require" Haystad and Jensen to cease using or handling nonunion doors. But that Com-

pany . . d already agreed, as a majority of the Board finds, that it would not require its employees to handle such products. It was not, then, business agent Fleisher's remarks to foreman Steinert which "forced or required" the Company to instruct the carpenters to cease performing this work. The Company was required by its contract, which a majority of this Board finds to be lawful and not opposed to public policy, to free its employees from the duty of handling nonunion material. In this respect, at least, the instant case is entirely distinguishable from the Sound Shingle case,[29] upon which the majority relies. Here the dispute was directly and immediately related to a condition of employment of Havstad and Jensen's employees, a condition resolved through collective bargaining and reduced to writing. Under these circumstances, it seems clear to me that the dispute was primary in nature and that it was not "an object" of the Union to affect the business relations between Havstad and Jensen and any other employer or person. As Judge Learned Hand has recently pointed out in a scholarly opinion,[30] there must be a distinction between the term "object" under Section 8 (b) (4) and a result that may flow from the Union's action. The liability imposed by this section, he held, "is much more limited than the usual liability for a tort, which extends to any damage that the tortfeasor should reasonably have expected to result from his act." If Congress had not imposed such a distinction, he pointed out, it would have made nearly all strikes unlawful. Where, as in the instant case, a union's objective is clearly and unmistakably limited to a primary

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[29]Supra.

[30]Douds v. Longshoremen's Association, 36 LRRM 2329, 2332.

dispute, involving an employer's contractual obligation, the fact that this dispute may in some manner affect other employers with whom the union has no dispute at all does not mean that "an object" of the union is to reach these employers and engage in secondary conduct within the meaning of Section 8 (b) (4) (A). Senator Taft's statements on the floor of the Senate, quoted extensively in footnote 21 of the majority's decisions, seems to me to affirmatively support this conclusion. In his view Section 8 (b) (4) (A) made it unlawful to incite workers to strike "when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike." (Emphasis added.) What could be more unsatisfactory to a group of employees than the imminent violation by their employer of a condition of their employment, a condition secured through the processes of collective bargaining and incorporated in a contract?

Apart from the foregoing, it seems to me that the majority's conclusion that Havstad and Jensen's foreman, Steinert, was acting solely as an agent of the Union when he instructed several employees not to handle the nonunion doors is unsupportable. The majority bases its finding on the fact that Steinert was a member of the Union and, as such, had agreed to enforce the Union's by-laws and trade rules. It is, however, uncontroverted that Steinert was also the authorized agent of Havstad and Jensen to whom the employees looked for instructions in the performance of their duties. If Steinert was acting for the Union he was no less under the common law rules of agency acting on behalf of Havstad and Jensen, who had authorized him to represent the Company and speak for it in supervising the work of these employees. At

most, therefore, any statements or actions of Steinert with regard to his work instructions to these employees must be construed as the joint action of both the Union and the Company. It is incomprehensible to me how the majority can conclude that employees, obediently following the instructions of their own foreman, are thereby being induced to engage in a strike or a concerted refusal to work for their employer. Indeed, I would suppose that the employees would be engaged in insubordination if they refused to follow Steinert's instructions. The fact that Havstad and Jensen permitted Steinert, its agent, to agree to enforce union rules seems to me to indicate nothing more than that the Company itself had consented to this procedure and made itself a party to such conduct by its foreman. To ignore Steinert's status as the Company's spokesman and to find, rather, that he represented only the Union and thus induced a strike of the employees he supervised, seems to me an unwarranted and unreasonable conclusion.

For these reasons I dissent.

Dated, August 26, 1955, Washington, D. C.

ABE MURDOCK, Member
National Labor Relations Board

APPENDIX "C."

Labor Management Relations Act of 1947.

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(B) "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which

application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional

evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).